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IN THE

Supreme Court of the United States

October Term, 1964

No. 227

MARGARET DAVIS, *et al.*,

Petitioners,

vs.

PAULINE D. MCLAUGHLIN, Administrix *de bonis non* of the Estate of Ingram M. Stainback, Deceased.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Court.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Court.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

This is an action brought to enforce a rejected probate creditor's claim filed against the Estate of Ingram M. Stainback, deceased.

Petitioners, the plaintiffs and appellants below, respectfully pray that a Writ of Certiorari issue to review a Judgment of the U. S. Court of Appeals for the Ninth Circuit entered April 2, 1964. Petition for Rehearing has been denied. Said Judgment affirmed a Dismissal of petitioners' action With Prejudice, and was entered by the U. S. District Court for the District of Hawaii on January 9, 1963.

Opinion Below.

The Opinion of the Circuit Court dated January 22, 1964, is printed in *Appendix "A"* annexed to this petition. The Order appealed from is set out in said Opinion.

Jurisdiction.

Appellee's "Statement of Facts conferring Jurisdiction" correctly shows that same is based on diversity of citizenship and amount in controversy. (28 U. S. C. A. Sec. 1332.) [See Complaint Par. 1, Tr. p. 3.]

The alignment of the heirs, existing at the time of the filing of said action in the United States District Court of Hawaii on December 8, 1961, was that Judge J. Frank McLaughlin, the then administrator, was a resident of the Territory of Hawaii; whereas plaintiff heirs were residents of various States within the continental limits of the United States: petitioners Georgia McPheeters and Glady O'Connell were residents of California; petitioner Mamie White Avery was a resident of Kansas and, each of the remaining petitioners were residents of Missouri.

It now also appears that these petitioners have been denied the benefits of due process of law. (U. S. Constitution, XIV Amendment.) An additional ground of Jurisdiction thereby further appears.

Statute Involved.

This case involves the interpretation of *Rule 41 of Rules of Federal Procedure*, which pertains to dismissal of actions. More particularly it involves the interpretation of *Rule 41(a)(1)* and *Rule 41(a)(2)* as same were applied by the District Court and the Court of Appeals to petitioners facts.

Statement of Facts.

Petitioners adopt the Chronological statement of facts contained in the Appellate Courts opinion produced at pages 1, 2, 3 and 4 of Appendix "A". Since as the Court has pointed out, Mr. Houston's brief on their behalf was inadequate in that it contained no statement of facts from petitioners' point of view, nor did it adequately cover the 17 points of error he appears to have relied on for their benefit, a further and supplemental statement of facts appears necessary.

This action was filed November 8, 1961 in the District Court of Hawaii by E. D. Crumpacker, Esq petitioners original attorney. He had accepted his retainer on a straight contingent fee basis.

The pleadings he prepared and filed in the Federal District Court of Hawaii, were probably not his best effort. It now appears possible that the case might better have been instead filed originally in the Hawaiian State Circuit Court, this Mr. Houston attempted to do.

In the original Complaint filed by Mr. Crumpacker, Cook Trust Co., Administrator of the Estate of Cecile Stainback was not joined either as a plaintiff or as a defendant. After this action was filed, Judge McLaughlin, Administrator of the Estate of Ingram W. Stainback, dec'd, himself died, but thereafter no Successor Administrator was immediately appointed.

Defendant's first response to petitioners' complaint took the form of a "Motion to Dismiss or for More Definite Statement." When this motion was filed on June 15, 1962, Mr. Crumpacker made no effort to defend his pleadings, but instead on July 6, 1962, and before any Hearing on the Motion, gave Notice of his

intention to withdraw as petitioners' attorney. (Appendix A, p. 3.)

This action on his part was opposed both by petitioners and (surprisingly) by defendants.

After a hearing, at which Georgia McPheeters was the only one of the 18 petitioners present, the Court announced originally that the matter of permitting his withdrawal would be set over to September 4, 1962 (see Opinion, Appendix "A", p. 4), nevertheless, on July 26, 1962 he was permitted to withdraw.

In the course of his efforts to persuade the Court to permit him to withdraw over objections, Mr. Crumpacker made statements and disclosures in open Court which it is believed influenced the entire subsequent cause of the litigation.

His remarks directed to Judge Pence indicated that he not only did not care to proceed further, but appears to have pointed out alleged "defects" and weaknesses in petitioners' case which only defendants themselves might properly have raised. In his haste to be relieved as counsel, it appears that he very effectively sabotaged petitioners' entire law suit.

Petitioners Were Unaware of What Was Happening.

During the period of time between July 26th and August 30, 1962 petitioners were entirely without an attorney. They were far removed from the forum of litigation, and all were physically on the mainland, and had no knowledge with regard to anything that Mr. Houston was doing.

Specifically, they had no reason to believe that any steps might be taken to Dismiss their action for any

purpose whatsoever, and specifically, no permission was ever granted to Mr. Houston or any other attorney to have done so under any circumstances.

When Mr. Brahan Houston took over on August 30, 1962, he was faced with the problem of attempting to repair the damage Mr. Crumpacker had caused, and attempting if possible, to select a proper forum for the proceedings.

On this date, however, the matter was not yet at issue. No pleadings other than the "Motion to Dismiss, etc." had been filed by defendants. There was as yet no Answer, nor any Counter-claim or any Cross-Complaint demanding affirmative relief on file. It appears that defendant's preparation had not proceeded beyond the point of taking depositions in the City of Honolulu where the action had been filed, on December 8, 1961.

For the purpose of cooperating with defendants Mrs. McPheeters had voluntarily come to Honolulu from Los Angeles on her own expense and had given her deposition on the 27th and 28th of January, 1962.

Petitioners Can Only Guess at What Mr. Houston Was Attempting to Accomplish.

It appears to be practice for an attorney in the early stages of litigation, to Remove his Cause of Action from the State to the Federal Court, or vice versa from the Federal Court to the State Court, depending upon what the facts appear to be. Mr. Houston appears in good faith to have believed that the case, in the posture which existed on August 30, 1962 should properly have been removed to the State Court because of possible Probate problems involved. His right to such removal should have been unchallenged.

This may account for Mr. Houston's filing of the Motion for Voluntary Dismissal on August 30, 1962, pursuant to *Rule 41(a)(1)* and his filing, on the same day of the new case in the Hawaiian State Circuit Court based on the same claim, but naming Cook Trust Co. Administrator of the Estate of Cecile Stainback, dec'd as an additional defendant, who was thus joined in the litigation for the first time. (Appendix, p. 4.)

On September 7, 1962, appellees objected to this attempted voluntary dismissal by moving to strike the Notice of Dismissal or in the alternative for terms and conditions under *Rule 41(a)(2)*. The Order appealed from followed in due course as the result of this motion. (Appendix, pp. 4 and 5.)

Additional Facts Exist.

Other important facts should also be noted: *i.e.*

A. There is a witness available who was personally present when Governor Stainback tore up and thereby destroyed the will of Cecile Stainback, his predeceased wife, shortly before her funeral;

B. True copies of the will he thus destroyed are available and can be offered in evidence, with proper foundation laid for its offer.

C. Cecile Stainback and Ingram Stainback had been married approximately twenty-eight (28) years at the time of her death; the property left by her was substantially all in the nature of community property.

D. When Governor Stainback, himself died in 1961, his Probate Estate was appraised at approximately $1,000,000.00.

E. Pauline D. McLaughlin, Administratrix *de bonis non* of the Estate of Ingram Stainback, apparently had not yet been appointed on August 30, 1962. The office of Administrator was vacant when Mr. Houston filed his first Appearance.

F. Governor Stainback was a person of great wealth and influence. His administrator and counsel appear to have been highly skilled members of the Bar at all stages; on the other hand, petitioners are all people of little means. The haste displayed by Mr. Crumpacker in abandoning his responsibilities as petitioners' attorney is totally unexplained. Mr. Houston, his successor, appears to have sacrificed his health in attempting to cure the debacle which resulted from Mr. Crumpacker's precipitate abandonment of petitioners' cause.

These facts all affirmatively appear from the record to be produced.

Reasons for Allowance of the Writ.

The U. S. Supreme Court may review any final judgment or decree of the Circuit Court of Appeals. 10 Am. Jur., Certiorari, p. 529; 27 R. C. L., p. 1.

And certiorari may issue, if the exigencies of the case are such that applicants once had a remedy which by the force of special circumstances has been lost and which address themselves to the discretion of the court. *United States v. Dickenson*, 213 U. S. 92, 53 L. Ed. 711, 29 S. Ct. 485; 10 Am. Jur., Certiorari, 532.

It appears that without any discernible fault of their own, petitioners now find themselves in a position from which there is no escape unless the requested Writ of Certiorari Issue.

Plainly, it never occurred to Mr. Houston that his offer of voluntary dismissal under *Rule 41(a)(1)* could ever in this early stage of the case be tortured into a situation which could involve the possible imposition of any of the conditions contemplated by *Rule 41(a)(2)*, or any Order of Court, or any of the procedures which the District Court subsequently insisted on adopting and applying to these facts. (Appendix A, p. 5.) [Tr. pp. 63-64.]

Questions Presented.

The "Statement of Points relied on by Appellants" [Tr. pp. 122-126 incl.] suggests seventeen (17) errors. It is unfortunate that Appellants' Brief as filed by Brahan Houston was insufficient to present same adequately. The District Court's opinion recognized only two claimed errors.

Petitioners respectfully contend that said issues cannot be compressed into only "two errors." By so limiting the scope of its ruling, the Appellate Court itself erred. (Appendix A, p. 6.)

Inherent in petitioners' Statement, but apparently not even recognized as such by Mr. Houston, is an additional fundamental error, namely, that under all the facts of this case have not these petitioners been denied *due process of law?* (XIV Amendment, U. S. Const.) It affirmatively appears they have had no opportunity for the fair presentation of their case on the merits in any trial Court.

Under the facts it would seem that *Rule 25(a)(1)*, may also be involved. But in any event it is certain that Mr. Houston believed that only *Rule 41(a)(1)* was applicable.

A Voluntary Dismissal Under Rule 41(a)(1) Was Proper.

The Court did not under the circumstances of this case have any right to treat the facts as being subject to any application of Rule 41(a)(2). Mr. Houston was correct.

(1) *Query:* Therefore, did the Court abuse its discretion in insisting that the case be dismissed only upon conditions as subsequently demanded by defendants?

(2) *Query:* Were the conditions for such dismissal as were thereafter subsequently imposed, in the form of the $4,967.25 cash payment, unreasonable?
(As it turned out, these impoverished petitioners were totally unable to comply with said Order.) [Tr. p. 95.]

(3) *Query:* Had the point of "*no return*" yet been reached on Aug. 30, 1962 from which petitioners through Mr. Houston could then no longer withdraw their offer of voluntary dismissal?

(4) *Query:* Was the posture of the case, at this point, such that on August 30, 1962 the petitioners, acting by Mr. Houston no longer had any control over their attempted dismissal, so that having once offered to dismiss it, they could not withdraw their offer?

ARGUMENT AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A. Abuse of Discretion Appears.

(1) The matter of discretion involved in granting dismissals under *Rule 41(a)* is ably discussed in 54 Columbia L. Rev. 616 at 618 where terms and conditions imposed by other courts under like circumstances is commented upon with cases collected: for example:

In Wilson v. Jolly, 7 F. R. D. 649 (N.D. Tex. 1948) (court costs and witness fees were imposed):

In Gold v. George T. Moore Sons, Inc., 3 F. R. D. 201 (S.D. N. Y. 1943). (defendant requested $350 lawyer's fee, but $250 held reasonable):

In Taylor v. Smith & Co., 2 F. R. D. 424 (S.D. Fla. 1942) ($33.80 court costs and $225 attorney's fee held reasonable):

In Mott v. Conn. Gen. Life Ins. Co., 2 F. R. D. 523 (N.D. Iowa 1942) (court costs plus bond premium plus $100 allowed):

and in De Fillipis v. Chrysler, 116 F. 2d 375 (2 Cir. 1940) (upon which the Appellate Court relied in affirmnig the Judgment appealed from herein).

It was held plaintiff's action would be dismissed with prejudice if such conditions imposed are not complied with.

(2) *However, it may be proper at times to allow plaintiff to dismiss without imposing any conditions:* all of the reasons suggested in support of this view

(see in 54 Columbia L. Rev. *supra* 620 and in particular (note 32) would appear to apply our case since it cannot be denied that substantially all of the expenses which defendants claim [Tr. pp. 70-72], would have been properly allowable to petitioners' proposed second suit in the Hawaiian State Court. *Therrien v. New Eng. Tel. & Tel.*, 102 F. Supp. 350, 351 (D. N.H. 1951).

Furthermore it appears Mr. Houston should have been permitted to withdraw his offer to dismiss when it appeared it could not be done without the imposition of conditions.

This precise problem is considered in 54 Columbia L. Rev. at pages 624-625. Petitioners contend that the "cut off point" had not yet on Aug. 30, 1962 been reached for the following reasons:

(a) The case was not at issue.

(b) No counter claim or request for affirmative relief had yet been pleaded;

(c) It cannot be contended that the expenses incurred in preparing the defense of this case would not have been substantially all equally applicable to the defense of the proposed action in the State court.

It is suggested that the Court's award of $4967.25 was under all of the facts of this case a preposterous award, and that Mr. Houston's picturesque comments on the subject made at the hearing of his motion to Recuse, although intemperate, were still excusable, since they do serve to point up the abuse of discretion in allowing such an Order to stand, when under the circumstances shown, Mr. Houston had every reason to have supposed he was acting under Rule 41(a)(1) only.

B. Dismissal With Prejudice Is a Drastic Sanction.

It should be kept in mind that dismissal with prejudice is a drastic sanction to be applied only in extreme situations.

Independent Productions Corp. v. Loew's Inc. (CA 2d 1960), 283 F. 2d 730, 733.

In *Syracuse Broadcasting Corp. v. Newhouse* (CA 2d 1959), 271 F. 2d 910, a dismissal was reversed.

For, as the Court said in *Gill v. Stolow* (CA 2d 1957), 240 F. 2d 669, 670:

"In the final analysis a Court has the responsibility to do justice between man and man; general principles cannot justify denial of a party's fair day in Court except on serious showing of wilful default."

Also in:

Red Warrior Coal & Mining v. Burdin (CA 3d 1952), 194 F. 2d 578, dismissal with prejudice was reversed as too harsh, and also in *Peardon v. Chapman* (CA 3d 1948), 169 F. 2d 90.

That defendants will be deprived of procedural rights afforded by Federal Rule (even if such should appear) does not constitute such prejudice to defendants as will warrant denial of plaintiffs' motion to dismiss without prejudice even though plaintiffs only motive is to recommence action in a State Court.

Walter v. E. I. DuPont de Nemours & Co., 1 F.R.D. 551.

A host of cases evidence reluctance of the Courts to bar a party from trial on the merits because of errors

of his legal representatives, or to penalize a party for an attorney's error.

Barber v. Turberville (1961), 295 F. 2d 235, 238 (CA 2d 1961).

Barden v. Mahoney (1961), 295 F. 2d 235, 238 (CA 2d 1961).

It appears that in the course of Colloquy Judge Pence also suggested that perhaps petitioners were bound by the "Two dismissal" Rule. It has been held, however, that the "Two dismissal" Rule does not apply where the second dismissal is by Court Order on Motion of plaintiff rather than by Notice.

American Cyanamid Co. v. McGhee (CA 5th 1963), 317 F. 2d 295.

C. Lack of Due Process Appears.

Adequate and proper representation, together with fair trial and a day in Court is a fundamental right guaranteed by the 14th Amendment to the United States Constitution.

Without such an opportunity to be heard, petitioners have not had their day in Court. The dismissal with Prejudice prevents such a hearing.

Since it now plainly appears that these parties have not, by reason of the facts shown by the record, had their day in Court, their constitutional rights have thus been denied them. No fault of their own has been or can be charged to them.

The dismissal should have been allowed without prejudice, and without conditions imposed under *Rule 41(a)-(2)*, or, in the alternative Mr. Houston should have been permitted to withdraw his offer to dismiss without any penalty as he offered to do, or if a penalty was assessed it should have been charged to him, and not to his clients, these petitioners.

D. Are These Petitioners Chargeable With the Misconduct of Their Attorneys.

Subsequently it appears Mr. Houston became disabled.

Where an attorney becomes disabled his contract of employment by his clients is terminated.

Pearces Metro Petroleum, 158 F. Supp. 791, 792.

An attorney is *not* clothed generally with authority to make serious statements of a factual nature in course of any pre-trial hearing except for purpose of simplifying matters.

Laird v. Air Carrier Engine., 263 F. 2d 948.

The relation of attorney and client is one of highest trust and confidence, and demands the utmost of good faith on the part of the attorney and courts will closely scrutinize any transaction in which an attorney has assumed a position antagonistic to his client. Mr. Crumpackers withdrawal deserves further scrutiny under the circumstances.

Goodwin v. Clement, 277 Fed. 586, 51 App. D.C. 184.

Courts may hold an attorney to strict compliance with an improvident contract.

Smith v. Jackson, 37 F. 2d 237 cert. den. 50 sec. 351, 281 U. S. 745, 74 L. ed. 1158.

Apparently Mr. Crumpacker considered his contingent fee contract unprofitable and attempted by any means to escape from it. Are these petitioner appellants therefore actually chargeable with the effect of the *totally unauthorized Dismissal* of their entire litigation?

Unless in some manner excused or avoided, said dismissal has now effectively extinguished their entire claims. Petitioners could not have suspected, or in any manner foreseen that such Dismissal would have been filed by their attorney.

E. The Law Contains Built in Safe Guards.

As appellants contended in their Petition for Rehearing, it would appear that the law contains *built-in safeguards against such contingencies*, and that *no actual foresight was required of them by law in this regard.* It is fundamental that *no attorney can take steps destructive of his clients' entire cause of action without their knowledge, permission or consent.* The authority of an attorney to control litigation entrusted to him is subject to the salutary and well recognized limitation that he *cannot without the consent of his clients take steps destructive of his clients' entire cause of action, and steps so taken are not binding on the clients.*

5 Am. Jur. 300:

Price v. McComish, 22 Cal. App. 2d 92, 97; 70 P. 2d 978:

City and County of San Francisco v. Leroy, 138 U. S. 565, 11 S. Ct. 364, 34 L. Ed. 1096.

For the implied authority of an attorney ordinarily does not extend to the doing of acts which will result

in the surrender or giving up of any substantial right of the clients.

7 C. J. S., Attorney and Client, p. 897:

Clover v. Bradley, 233 Fed. 721, Ann. Cas. 1917A 921.

and certainly no express authority to dismiss was given.

Nor does such implied authority extend to the imposition of new liability upon them without special permission or consent.

7 C. J. S., Attorney and Client, p. 897:

Robert R. Sizer & Co. v. Chiarello Bros., 32 F. 2d 333.

and certainly no express authority to incur the $4,967.25 penalty condition was ever intended.

From the record, the withdrawal or resignation of E. D. Crumpacker as plaintiffs' attorney under the unusual circumstances, appears to have handicapped the effective conduct of petitioners' litigation.

Conclusion and Prayer.

Wherefore, no other recourse remaining, a Writ of Certiorari to the Court of Appeals should issue, to the end that the Judgment and Order in the instant cause may be reviewed.

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Of Counsel:
LAUREN M. HANDLEY.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Margaret Davis, et al., Appellants, vs. Pauline D. McLaughlin, Administratrix of the Estate of Ingram M. Stainback, deceased, Appellee. No. 18,633. Jan. 22, 1964.

Appeal from the United States District Court for the District of Hawaii.

Before: Barnes, Hamlin and Merrill, Circuit Judges

Barnes, Circuit Judge:

This is an appeal wherein no statement relating to the facts of the case is made by appellants. We therefore adopt appellee's statement of facts, in part, as follows:

"Appellee's intestate, Ingram M. Stainback, was for many years Governor of the Territory of Hawaii.

This action was filed by appellants on December 8, 1961. The gist of appellants' asserted claim, as disclosed by the complaint and Exhibit A thereto (a copy of a Statement of Claim of Creditors made by appellants to, and rejected by, Governor Stainback's administrator) is:

After the death of Governor Stainback's wife, Cecile White Stainback, on October 11, 1949, Governor Stainback destroyed her will, in which she had bequeathed all her property to her parents, and concealed property belonging to her from the administrator of her estate. On February 19, 1952 the net estate of Mrs. Stainback

was distributed one-half to appellants [note] and one-half to Governor Stainback. Governor Stainback died intestate on April 12, 1961.

On January 16, 1962 a notice to take the deposition of appellant Georgia McPheeters was filed. After some difficulty, appellant McPheeters' deposition was taken in Honolulu on Saturday, January 27 and Sunday, January 28, 1962.

On January 31, 1962 appellants filed and served written interrogatories to appellee. Appellee filed answers to these interrogatories on February 26, 1962, and an amended answer on March 9, 1962.

On June 15, 1962, appellee filed a motion to dismiss or for a more definite statement.

On July 2, 1962, the deposition of appellant Georgia McPheeters was filed in the district court.

On July 6, 1962, before any hearing on appellee's motion to dismiss or for a more definite statement, appellants' attorney, E. D. Crumpacker, Esq., filed a motion for leave to withdraw as counsel for appellants. On July 12, 1962 there was a lengthy hearing on Mr. Crumpacker's motion in which appellant McPheeters personally participated. Appellee opposed Mr. Crumpacker's request for leave to withdraw as counsel for appellants. After hearing both Mrs. McPheeters and Mr. Crumpacker, the court conditionally granted Mr. Crumpacker's motion for leave to withdraw but ordered him to notify each appellant other than appellant McPheeters that he had moved to withdraw as their attorney, that there would be a further hearing on his motion to withdraw, and that unless appellants appeared and showed cause why he should not be permitted to

withdraw, he would be so permitted. The court further ordered Mr. Crumpacker to send a copy of appellee's motion to dismiss to each appellant with notice that the motion would be heard at 9:00 A.M. on September 4, 1962. On July 20, 1962 the court granted Mr. Crumpacker leave to withdraw, and a written order to that effect was filed on July 26, 1962.

On August 30, 1962 appellants' present counsel, Brahan Houston, Esq., filed his appearance and a notice of dismissal—purportedly without prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure.

The same day—August 30, 1962—that appellants purported to dismiss this action in the district court they commenced in the Circuit Court of the First Circuit of the State of Hawaii a new suit based on the same claim asserted in this action. The defendants in the state court action were Judge McLaughlin as administrator of the estate of Governor Stainback and the Cooke Trust Company, Ltd., which had been administrator of Mrs. Stainback's estate. [note]

On September 7, 1962 appellee moved to strike the notice of dismissal filed by appellants or in the alternative that the court permit dismissal by appellants only on just and reasonable terms and conditions. On September 17, 1962 the district court 'ruled that the notice of dismissal stand, conditioned upon the payment to defendant of his costs, etc., and if an agreement on the amount cannot be reached, then hearing on the matter be set for November 1, 1962 at 9 a.m.' A written order to this effect which also provided that counsel for the respective parties should confer in an attempt to agree on the amount appellants should pay appellee was filed on October 1, 1962.

Appellee filed memoranda of costs and attorneys' fees and affidavits with respect thereto on November 1 and November 8, 1962.

On November 8, 1962, at a continued hearing on the amount of costs and attorneys' fees to be assessed, the district judge made it clear that in his opinion the only basis for a dismissal was under Rule 41(a)(2) of the Federal Rules of Civil Procedure, and that unless otherwise specified in the order of dismissal, such a dismissal would be *without prejudice*. The court set the amount of $4,967.25 as the amount to be paid by appellants to appellee as the condition of a voluntary dismissal without prejudice. On November 29, 1962 a written supplemental order on appellee's motion to strike appellants' notice of dismissal was filed; this order was amended in open court on December 19, 1962. This supplemental order as so amended provides:

> 'IT IS HEREBY ORDERED that the Plaintiffs jointly and severally pay to the Defendant or his legal successor within thirty (30) days from the entry hereof, the sum of FOUR THOUSAND NINE HUNDRED SIXTY SEVEN AND 25/100 DOLLARS ($4,967.25) for the costs and attorneys' fee incurred by Defendant in this matter; and in the event the Plaintiffs shall fail to meet this condition, this cause will stand dismissed with prejudice for failure to comply with terms and conditions of court.'

On November 19, 1962, eleven days after the court had ruled that appellants' dismissal of this action without prejudice was to stand on condition that they pay appellee's costs and expenses in the amount of $4,967.25, appellants filed: (1) a motion to amend the complaint; (2) a document entitled 'Plaintiffs' Election

to Continue On In This Court and Cause'; and (3) motion for Judge Pence to recuse himself 'because of bias and prejudice on the part of the Honorable Martin Pence toward plaintiffs and their cause' together with an affidavit of appellants' attorney in support thereof.

The next day, November 20, 1962, appellants filed a document entitled 'Plaintiffs' Joinder in 'Defendant's Motion to Strike Plaintiffs' Dismissal'.

An affidavit of prejudice by appellant Georgia McPheeters was filed on November 29, 1962. The same day the motion for Judge Pence to recuse himself was denied.

On December 5, 1962 a written order denying appellant's motion for Judge Pence to recuse himself was signed and filed.

Appellants then filed motions to set aside the district court's orders. On December 19, 1962 these motions were denied and, after an extensive colloquy between the court and counsel for appellants, the order dated November 29, 1962 was amended.

On January 9, 1963 this action was ordered dismissed with prejudice for failure of appellants to fulfill the terms and conditions fixed by the court within the prescribed time."

Appellants urge two errors:

(1) That the district judge erred in refusing to recuse himself on motion of appellants;

(2) that the district court erred in dismissing the action with prejudice upon the failure of appellants to meet the terms and conditions imposed by the court to prevent such a dismissal.

Counsel for appellants cite one case in their brief—*Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 1962, 371 U.S. 215, which has to do with what constitutes "excusable neglect" based on a failure of a party to learn of an entry of judgment and hence fail to file a notice of appeal within the thirty day period required by the statute. This court denied appellee's motion to dismiss this appeal on July 8, 1963. Hence the case cited supports our previous action, but has no applicability to the merits of this appeal.

The balance of appellants' brief consists of argument and attacks on the trial judge. It nowhere meets the issues, *i.e.*, the alleged errors recited above.

The motion to recuse was made after the trial judge had heard the matter and indicated how he intended to rule. His refusal to recuse was not error. *L. A. Trust Deed & Mortgage Exchange v. Sec. & Exch. Commission*, 9 Cir. 1960, 285 F. 2d 162, cert. denied 366 U.S. 919; *Barnes v. United States*, 9 Cir. 1956, 241 F.2d 252; *Price v. Johnston*, 9 Cir. 1942, 125 F.2d 806, cert. denied 316 U.S. 677; *Cole v. Loews, Inc.*, S.D.Cal. 1948, 76 F.Supp. 872, reversed on other grounds, 9 Cir. 1950, 185 F.2d 641, cert. denied, 1951, 340 U.S. 954.

The conditional order to dismiss was not error. Fed. R. Civ. P. 41(a)(2). *Federal Savings & Loan Assn. v. Reeves*, 8 Cir. 1945, 148 F.2d 731. Nor was the dismissal with prejudice when the conditions were not met. *De Fillipis v. Chrysler Sales Corp.*, 2 Cir., 1940, 116 F.2d 375.

Affirmed.

(Endorsed) Opinion Filed Jan. 22, 1964.

Frank H. Schmid, Clerk.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 227

MARGARET DAVIS, *et al.*,

Petitioners,

vs.

PAULINE D. McLAUGHLIN, Administratrix *de bonis non* of the Estate of Ingram M. Stainback, deceased.

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

To the Honorable Earl Warren, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Respondent Pauline D. McLaughlin, Administratrix *de bonis non* of the Estate of Ingram M. Stainback, Deceased, in response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, respectfully suggests that no sufficient grounds exist for the granting of said petition because:

(1) This case presents no "special and important reasons" of the character specified in Rule 19 of the Revised Rules of this Court as grounds for granting a writ of certiorari.

(2) The Court of Appeals for the Ninth Circuit committed no error in affirming the judgment of the District Court for the District of Hawaii.

Opinion Below and Statement of Jurisdiction.

The opinion of the Court of Appeals for the Ninth Circuit in this action is reported as *Davis v. McLaughlin*, 326 F. 2d 881 (9th Cir. 1964).

This action was commenced in the United States District Court for the District of Hawaii by petitioners as plaintiffs against the late Judge J. Frank McLaughlin, Administrator of the Estate of Ingram M. Stainback, Deceased. Jurisdiction was based on alleged diversity of citizenship and amount in controversy, 28 U. S. C. Sec. 1332 [See par. 1 of the Complaint, R. p. 3]. Subsequent to the commencement of this action, Pauline D. McLaughlin, Administratrix *de bonis non* of the Estate of Ingram M. Stainback, Deceased, was substituted as defendant in place of the late Judge McLaughlin [R. pp. 32-33].

The judgment of the court of appeals was filed and entered January 22, 1964 [R. Vol. 1]. On April 2, 1964, the petition of petitioners for a rehearing by the Court of Appeals was denied [R. Vol. 1]. Although petitioners have not so stated, they apparently invoke the jurisdiction of this Court under 28 U. S. C. Secs. 1254 and 2101.

Questions Presented.

Petitioners raise but one issue: Did the district judge err in ruling that petitioners could not voluntarily dismiss this action without prejudice under Rule 41-(a)(1) of the Federal Rules of Civil Procedure, but could voluntarily dismiss without prejudice only under

Rule 41(a)(2) "upon order of the court and upon such terms and conditions as the court deems proper", and did the district judge commit an *abuse of discretion* in setting the terms and conditions of such a dismissal and ordering this action dismissed with prejudice upon petitioners' failure to comply with those terms and conditions?

Summary of Respondent's Argument.

Petitioners do not attempt to demonstrate that any reasons of the character specified in Rule 19(b) of the Revised Rules of this Court for granting a writ of certiorari exist in this case. In fact, there is no reason for this Court to review the judgment of the court of appeals below. The district judge correctly held that the only basis for a voluntary dismissal by plaintiffs (petitioners here) was under Rule 41(a)(2) of the Federal Rules of Civil Procedure, because a motion to dismiss which tendered issues going to the merits of the action, which referred to matters outside the pleadings and which was in effect a motion for summary judgment, had been filed by defendant (respondent here). (See Fed. R. Civ. P. Rule 12(c).) The district judge acted in accordance with long-established precedent in specifying as the condition of a dismissal without prejudice that petitioners reimburse respondent for a *part* of her expenses and attorneys' fees, and in dismissing this action with prejudice when petitioners failed to comply with such condition. In the circumstances of this case, the condition set by the district judge was not an abuse of discretion.

Petitioners have not presented a complete statement of all pertinent facts. For this reason, and for the

further reason that a full statement of the facts will, better than any other argument, demonstrate that no reason exists to grant a writ of certiorari in this case, we shall present a statement of the facts shown by the record. We shall then briefly demonstrate that the judgments below are not erroneous.

Statement of Facts.

Respondent's intestate, Ingram M. Stainback, was governor of the Territory of Hawaii for nine years, longer than any other governor in the history of the Territory, and on his retirement from that office was a justice of the Supreme Court of Hawaii for eight years. See memorial resolution at 44 Hawaii 709.

Governor Stainback died intestate on April 12, 1961.

This action was filed by petitioners on December 8, 1961. The gist of petitioners' asserted claim, as disclosed by the complaint and Exhibit "A" thereto (a copy of a Statement of Claim of Creditors made by petitioners to, and rejected by, Governor Stainback's administrator) is [R. pp. 2-10][1]:

> Governor Stainback's wife, Cecile White Stainback, died on October 11, 1949. After her death, Governor Stainback destroyed her will, in which she had bequeathed all her property to her parents, and concealed property belonging to her ("including substantial items of community property") from the administrator of her estate. On February 19, 1952, the net estate of Mrs. Stainback was distributed one-half to petitioners and one-half to Governor Stainback. Petitioners prayed that a con-

[1] The estate was distributed one-half to Governor Stainback and one-fourth each to the estates of the

structive trust be imposed on Governor Stainback's estate to the extent necessary to cover petitioners' claim and that Governor Stainback's administrator be required to account to them for all property in the Governor's estate allegedly traceable to the community property and personal property of Mrs. Stainback which was allegedly "fraudulently withheld" by Governor Stainback from her estate [R. p. 4].[2]

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mother and father of petitioners. Petitioners allege that the net estates of their parents were ultimately distributed to them [R. p. 7].

[2]As points of information: Hawaii had a community property law only between 1945 and 1949. A 1949 statute dissolved every marital community existing and provided that existing community property and the profits and substitutions thereof shall be governed by Chapter 320 of the *Revised Laws of Hawaii* (1955). See note preceding that chapter at 2 *Revised Laws of Hawaii* 1589 (1955). Section 320-1 of the *Revised Laws of Hawaii* establishes a rebuttable presumption that all property, real and personal, "acquired in the name of the husband or of the wife, without regard to the time of acquisition thereof, is the separate property of the spouse in the name of whom the same shall have been acquired". Section 320-19 of the *Revised Laws of Hawaii* provides that upon the death of a spouse, one-half of the community property shall continue to belong to the survivor and the other half shall pass in accordance with testamentary disposition by the decedent or, in the absence of such disposition, to the heirs of the decedent. In the absence of issue and when there is a surviving parent (as was the case here), a surviving husband takes one-half of the estate by inheritance. *Revised Laws of Hawaii*, Sec. 318-4(c) (1955). Hawaii also has estates by dower and curtesy granting the husband a one-third fee interest in the wife's personal property. *Revised Laws of Hawaii*, Ch. 310 and Sec. 310-1o (1955).

This action was brought more than twelve years after Mrs. Stainback's death and the alleged wrong of Governor Stainback, almost ten years after the close of Mrs. Stainback's estate, and after the death of the alleged wrongdoer and best, if not only witness for the defense.

On January 16, 1962, a notice to take the deposition upon oral examination of petitioner Georgia McPheeters was filed [see entry in district court docket, R. p. 49]. The circumstances concerning the taking of Mrs. McPheeters' deposition are set forth in the "Affidavit of Howard S. Smith re Costs and Legal Fees incurred by Defendant" [R. pp. 73-78] and the "Supplemental Affidavit of Howard S. Smith re Employment of Firm of Mitchell, Silberberg & Knupp" [R. pp. 109-113], and are as follows:

Since Mrs. McPheeters was a resident of Los Angeles County, California, her deposition was set by stipulation with her attorney to be taken in Los Angeles, California, on Saturday, January 27, 1962. Later, at the request of Mrs. McPheeters' attorney and Mrs. McPheeters, it was agreed that her deposition would be taken in Honolulu on the same date.

Mrs. McPheeters' attorney, however, refused to stipulate in writing that Mrs. McPheeters would produce certain documents at her deposition in Honolulu, apparently on the grounds that he was not able to communicate with Mrs. McPheeters. Because of what respondent's attorneys considered to be the unreasonable refusal of Mrs. McPheeters and her attorney to produce at her deposition in Honolulu documents which she could be compelled to produce were her deposition taken in Los Angeles, and because her deposition had been

changed from Los Angeles to Honolulu at her and her attorney's request, respondent's attorneys notified petitioners' attorneys that Mrs. McPheeters' deposition would be taken in Los Angeles on notice at the previously agreed time. A formal notice to that effect was prepared and filed in Honolulu. A certified copy of that notice was filed in the United States District Court for the Southern District of California, Central Division, under Civil Action File No. 646-Misc. and a subpoena duces tecum issued, which was served on Mrs. McPheeters in Los Angeles County. It was only after the service of that subpoena duces tecum that Mrs. McPheeters agreed in writing to produce those documents in Honolulu. Mrs. McPheeters' deposition was taken in Honolulu on Saturday, January 27, and Sunday, January 28, 1962 [see R. pp. 73-78 and 109-113].

On January 31, 1962 petitioners filed and served written interrogatories. Respondent filed answers to those interrogatories on February 26, 1962 and an amended answer on March 9, 1962 [see entries in district court docket, R. p. 49].

On June 15, 1962, respondent filed a motion, denominated a motion to dismiss or for a more definite statement, which squarely put into issue the merits of this action and which was in fact and effect a motion for summary judgment [R. pp. 53-56]. Included in the grounds of that motion were the following:

> "5. It appears on the face of the complaint that the claim, if any, is barred by laches and delay of Plaintiffs."
>
> "6. The claim, if any, arose almost thirteen (13) years prior to the filing of the complaint

herein, and the action is therefore barred by the State of Hawaii's six year statute of limitation to recover personal property and ten year statute of limitation to recover real property."

"7. The Plaintiffs are barred by res judicata."

"8. The Plaintiffs' claim is entirely conjectural and without any foundation in fact." [R. p. 55.]

On July 2, 1962, the deposition of petitioner Georgia McPheeters was filed in the district court [see entry in district court's docket, R. p. 49].

On July 6, 1962, petitioners' attorney, E. D. Crumpacker, Esq., filed a motion for leave to withdraw as counsel for petitioners [R. pp. 57-58]. On July 12, 1962, a hearing was had on Mr. Crumpacker's motion; petitioner McPheeters personally participated at that hearing [see R. p. 142, lines 11-19; p. 144, line 15, to p. 148, line 22; p. 151, line 20, to p. 153, line 9; p. 154, line 22, to p. 155, line 11; p. 158, line 11, to p. 159, line 10; p. 163, line 6, to p. 164, line 1; p. 166, lines 2-24, and p. 172, lines 3-17]. Respondent opposed Mr. Crumpacker's motion [R. p. 162, lines 15-19]. After hearing both Mr. Crumpacker and Mrs. McPheeters, the district court conditionally granted Mr. Crumpacker leave to withdraw. The district judge, however, took great pains to protect petitioners' rights. In addressing Mrs. McPheeters, he pointed out that he did not "know enough about the facts and cannot know enough about the facts until the case is tried to say whether or not what was done at that time affects your own particular claim" [R. p. 161, lines 22-25]; he ordered Mr. Crumpacker to notify each petitioner other than Mrs. McPheeters, individually, in writing, that

there would be a further hearing on his motion for leave to withdraw, so that each petitioner might have an opportunity to appear and be heard, either personally or by counsel; he carefully and in detail advised Mrs. McPheeters that Mr. Crumpacker would be permitted to withdraw if petitioners made no further showing, but that "if you or any of the rest of them at that time wish to have the matter heard, I will formally consider anything which you or any of the rest of them wish to offer. . . ." [R. p. 169, lines 9-11; pp. 167-170]. The district judge conditioned Mr. Crumpacker's withdrawal on his notifying in writing all petitioners other than Mrs. McPheeters that his motion would be heard on Friday, July 20, 1962, at 9:00 o'clock a.m. [R. p. 167, line 20, to p. 168, line 8, and p. 170, lines 8-11], and on his sending each petitioner a copy of the then pending motion of respondent to dismiss the action with notification that that motion would be heard on September 4, 1962, at 9:00 o'clock a.m., so that, if Mr. Crumpacker's motion to withdraw were finally granted, petitioners would know that they had to obtain new counsel and so that there would be adequate time to select new counsel and for new counsel to prepare [see R. p. 170, line 20, to p. 171, line 18; p. 173, line 1, to p. 174, line 18].

On July 20, 1962, the district court granted Mr. Crumpacker's motion for leave to withdraw [see minutes of district court for July 20, 1962, R. p. 136], and a formal written order to that effect was filed on July 26, 1962 [R. pp. 59-60].[3]

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[3]Mr. Crumpacker's notice to petitioners is not included as a part of the record on appeal. The docket of

On August 30, 1962, petitioner's new counsel, Brahan Houston, Esq., filed his appearance [R. pp. 24-25] and a notice of dismissal—purportedly without prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure [R. pp. 61-62].

The same date petitioners purported to dismiss this action in the district court, they commenced in the Circuit Court of the First Circuit of the State of Hawaii a new suit based on the same claim asserted in this action. The defendants in the state court action were Judge McLaughlin as administrator of the estate of Governor Stainback, and the Cooke Trust Company, Ltd., which had been administrator of Mrs. Stainback's estate.[4]

On September 7, 1962, respondent moved to strike the notice of dismissal filed by petitioners, or in the alternative, that the court permit dismissal by petitioners only on just and reasonable terms and conditions [R. pp. 63-64]. On September 17, 1962 the district court "ruled that the notice of dismissal stand, conditioned upon the payment to defendant of his costs, etc., and if an agreement on the amount cannot be reached, then

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the district court indicates that this notice and a certificate of mailing were filed on July 13, 1962 [R. p. 49].

[4]The various documents filed in the state court, consisting of a summons and complaint, notice of dismissal, motion and affidavit to amend notice of dismissal and notice of hearing, and order denying motion to amend notice of dismissal were filed in the district court. [See entry in district court's docket R. p. 50.] They were included as a part of the record on appeal in the court of appeals and respondent has requested the clerk of the court of appeals to certify them to this court.

hearing on the matter be set for November 1, 1962 at 9 a.m." [See minutes of district court at R. p. 136 and entry in district court docket at R. p. 49]. A written order to that effect, which also provided that counsel for the respective parties should confer in an attempt to agree on the amount of costs was filed on October 1, 1962 [R. pp. 65-66].

Respondent filed memoranda of costs and attorneys' fees and affidavits with respect thereto on November 1 and November 8, 1962 [R. pp. 67-69; 70-72 and 73-78]. A supplemental affidavit was filed on December 17, 1962 [R. pp. 109-113].

At a hearing on November 8, 1962, the district judge made it clear that in his opinion the only basis for a dismissal was under Rule 41(a)(2) of the Federal Rules of Civil Procedure, and that "unless otherwise specified in the order of dismissal under this paragraph, *it is without prejudice.*" (Emphasis added.) [R. p. 176, lines 3-10.] After considering several factors, including that respondent had incurred out-of-pocket costs of $1,467.25, attorneys' fees of a reasonable value of $7,000.00 ("without going into the time spent on research and the two hearings on motions and the research on the Motion to Strike and so forth") [R. p. 177, lines 17-19], and that petitioners intended to file another action and that respondent had obtained value from the attorneys' fees expended in this action that would inure to her benefit in such a subsequent action, the district court set the amount of $4,967.25 as the amount to be paid by petitioners to respondent as a condition of the voluntary dismissal of this action without prejudice [see R. p. 177, line 1, to p. 178, line 11]. That the district judge carefully considered the evidence

before setting the payment of that sum as the condition of dismissal without prejudice is shown further by his remarks in a subsequent hearing [see R. p. 192, line 8, to p. 194, line 24].

On November 29, 1962, a written supplemental order on respondent's motion to strike petitioners' notice of dismissal was filed [R. pp. 94-95]. This order was amended in open court on December 19, 1962 to correct it and show clearly the basis on which the district court ruled [see transcript of hearing of that date, R. p. 202, line 13, to p. 204, line 14; entry in district court docket, R. pp. 50-51, and the district court's minutes, R. p. 138]. That supplemental order as so amended provides:

> "It Is Hereby Ordered that the Plaintiffs jointly and severally pay to the Defendant or his legal successor within thirty (30) days from the entry hereof, the sum of Four Thousand Nine Hundred Sixty-Seven and 25/100 Dollars ($4,967.25) for the costs and attorneys' fees incurred by Defendant in this matter; and in the event the Plaintiffs shall fail to meet this condition, this cause will stand dismissed with prejudice for failure to comply with terms and conditions of court."

On November 19, 1962, more than two and one-half months after petitioners filed their notice of dismissal and eleven days after the district court's ruling that petitioners' dismissal of this action without prejudice was to stand on condition that they pay respondent's cost and expenses in the amount of $4,967.25, petitioners filed: (1) a motion to amend the complaint; (2) a document entitled "Plaintiffs' Election to Continue On In This Court and Cause"; and (3) a mo-

tion for Judge Pence to recuse himself "because of bias and prejudice on the part of the Honorable Martin Pence towards plaintiffs and their cause" together with an affidavit of petitioners' attorney in support thereof [R. pp. 79-87].

The next day, November 20, 1962, petitioners filed a document entitled "Plaintiffs' Joinder in Defendant's Motion to Strike Plaintiffs' Dismissal" [R. pp. 88-89].

An affidavit of prejudice by petitioner Georgia McPheeters was filed on November 29, 1962 [R. pp. 90-93]. The same day, Judge Pence denied the motion that he recuse himself [see entries in docket of district court, R. p. 50, and in district court's minutes, R. p. 138], and on December 5, 1962, a written order denying the motion was signed and filed [R. pp. 97-98].

Petitioners then filed motions to set aside the district court's orders [R. pp. 99-101; 106-108]. On December 19, 1963, these motions were denied and, after an extensive colloquy between the court and counsel for petitioners, the order dated November 29, 1962 was amended as above stated [see entries in the district court's docket and minutes, R. pp. 50 and 138, and R. pp. 182-204].

On January 9, 1963, this action was ordered dismissed with prejudice for failure of petitioners to fulfill the terms and conditions fixed by the court within the prescribed time [R. pp. 12-15].

ARGUMENT.

I.

MANY OF THE FACTUAL STATEMENTS SET FORTH IN THE PETITION ARE NOT SUPPORTED BY THE RECORD, OR ARE INACCURATE.

We realize that present counsel for petitioners commenced their representation of petitioners only lately, first appearing in connection with the filing of a petition for rehearing in the court of appeals.[5] For this reason, they may not be fully familiar with the facts in this matter. There are certain factual statements made in the petition which are either wholly unsup-

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[5]The record indicates that petitioners' present counsel are the sixth attorneys petitioners have retained or consulted in connection with various phases of this action. This action was filed by Mr. Crumpacker, who was replaced as attorney of record by Mr. Houston. It appears from the "Affidavit in Opposition to Motion to Dismiss Appeal and Exhibit 'A'" of Georgia McPheeters, filed in the court of appeals (which respondent has asked the clerk of the court of appeals to certify to this Court as part of the record), that Mrs. McPheeters also consulted with "the office of the late Mr. Jerry Geesler [sic] in Los Angeles" and with Howard K. Hoddick, Esq., of Honolulu, concerning petitioners' appeal. Mr. Crumpacker's and Mrs. McPheeters' statements at the hearing on Mr. Crumpacker's motion for leave to withdraw indicate that the petitioners residing in Missouri extensively consulted with, if not retained, Lon Haymes, Esq., an attorney in Springfield [R. p. 151, line 20, to p. 153, line 8]. Exhibit 3 to Mrs. McPheeters' deposition filed in the district court is a letter to respondent's Los Angeles attorneys written by Don Edwin Raney, Esq., a Long Beach, California, attorney, for Mrs. McPheeters in connection with her deposition.

ported by the record, or are inaccurate. Lest the court be misinformed, we think it necessary to correct those statements.

A. There Are Direct Statements of Fact Which Are Unsupported by the Record.

1. The petition, at page 4, states that the district court set over the hearing on Mr. Crumpacker's motion to withdraw to September 4, 1962, but nonetheless permitted him to withdraw on July 26, 1962. The docket and minutes of the district court show clearly that the hearing on Mr. Crumpacker's motion to withdraw was continued to July 20, 1962, and that it was the hearing on the motion to dismiss that was continued to September 4, 1962 [R. pp. 49 and 136].

2. The petition, at page 4, states that during the period of time between July 26 and August 30, 1962, petitioners were entirely without an attorney. This statement is entirely without support in the record, and is contrary to the clear implications of Mrs. McPheeters' statements in her affidavit in the court of appeals and to Judge Pence. See footnote 5, *supra*.

3. The petition, at pages 4 to 5, states that Mr. Houston was never authorized to file a notice of dismissal of this action. This statement is totally unsupported by the record. It is repeated at page 16 of the petition, and apparently forms the basis for a substantial part of petitioners' argument. Mrs. McPheeters, the petitioner who has actively controlled this litigation throughout, was personally present at the argument in the court of appeals on respondent's motion to dismiss the appeal and was personally present when the court of appeals called the case for argument on the

merits: Mrs. McPheeters personally swore to an affidavit of prejudice against Judge Pence *after* the notice of dismissal had been filed and he had specified the conditions complained of [R. pp. 90-93]: she personally swore to an affidavit in opposition to respondent's motion to dismiss the appeal, in which she testified to many communications with Mr. Houston pertaining to this matter. Yet, no claim was ever made that Mr. Houston did not have authority to dismiss this action until present counsel for petitioners filed the petition for rehearing in the court of appeals.

4. At page 5 the petition states that at the time the notice of dismissal was filed defendant's preparation had not preceded beyond the point of taking depositions in Honolulu. This statement is clearly contrary to the facts shown in the record. See the memoranda of costs and attorneys' fees [R. pp. 67-69, 70-72], the "Affidavit of Howard S. Smith Re Costs and Legal Fees Incurred by Defendant" [R. pp. 73-78], the "Supplemental Affidavit of Howard S. Smith Re Employment of Firm of Mitchell, Silberberg & Knupp" [R. pp. 109-113], showing the extraordinary nature of the expenditures required in connection with Mrs. McPheeters' deposition, and the entries in the district court's docket [R. p. 49] showing that respondent had prepared and filed answers and amended answers to written interrogatories of petitioners. Moreover, respondent's attorneys had prepared and filed a motion to dismiss which raised factual and legal issues going directly to the merits of the case. [R. pp. 53-56].

5. At page 5 the petition states that Mrs. McPheeters "voluntarily" came to Honolulu to give her deposition "for the purpose of cooperating with defendants". This statement is contrary to the facts on the record

which are set out in some detail in respondent's statement of facts and which demonstrate a *lack* of cooperation by Mrs. McPheeters.

6. At page 6 the petition states that a witness is available who was personally present when Governor Stainback allegedly destroyed his wife's will. This statement is wholly unsupported by the record.[6]

7. At page 6 the petition states that true copies of Mrs. Stainback's will are available and can be offered in evidence with proper foundation. This statement is wholly without support in the record.

8. At page 6 the petition states that the property left by Mrs. Stainback "was substantially all in the nature of community property." This statement is wholly

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[6]Petitioner McPheeters claimed in her deposition that she was an eye witness to the destruction by Governor Stainback of Mrs. Stainback's will. She also testified repeatedly that petitioners intentionally refrained from suing Governor Stainback during his lifetime in connection with the claimed destruction of Mrs. Stainback's will and the alleged concealment by him of her property. Of course, these statements, if true, would conclusively establish the defense of laches. Mrs. McPheeters' deposition also revealed that she enjoyed a friendly relationship with Governor Stainback to the time of his death. Her deposition was filed in the district court; should this Court or counsel for petitioners wish to augment the record by certifying Mrs. McPheeters' deposition, appropriate references thereto are as follows: p. 131, line 14, to p. 140, line 9; p. 161, line 4, to p. 165, line 7; p. 191, line 21, to p. 193, line 5; p. 213, line 14, to p. 217, line 17; p. 279, lines 10-25; p. 280, line 12, to p. 292, line 3; p. 324, line 10, to p. 328, line 14 (in which Mrs. McPheeters expressly admits that "a contributing factor" to her signing the papers to institute this suit was the fact that Governor Stainback was dead); p. 345, line 25, to p. 347, line 20, and p. 360, line 17, to p. 364, line 9.

without support in the record. In view of the short life of the Hawaii community property law and the statutory presumption in favor of separate property, there is a rebuttable presumption to the contrary (see note 2, *supra*). There is nothing in the record to rebut this presumption.

9. At pages 7 and 14 of the petition, statements are made to the effect that Mr. Houston "sacrificed his health" and "became disabled." These statements are wholly without support in the record. The attorneys for respondent had no information of any such disability until receiving a copy of the petition.

B. There Are Insinuations of Facts That Are Unsupported by and Contrary to the Record.

Petitioners seek, by innuendo, to have this Court infer that there was something sinister and unethical in Mr. Crumpacker's withdrawal. See petition, pages 4 and 7. The reasons presented by Mr. Crumpacker to the district court in support of his request that he be relieved, and on the basis of which the court granted that request were that subsequent to his retainer, he discovered facts, which had not been disclosed to him at the time he was employed, which related to *acts taken by petitioners* (including much correspondence between them and attorneys for them and Governor Stainback and Mrs. Stainback's administrator), which tended materially to weaken the case, and which would have influenced his initial decision to represent petitioners [see R. p. 143, lines 10-13; p. 155, lines 14-18; p. 156, line 24, to p. 161, line 11; p. 164, lines 9-20, and p. 165, line 13, to p. 166, line 1]. There is no evidence in the record in any way supporting any inference of wrongdoing by Mr. Crumpacker.

II.

NO GROUNDS EXIST FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

A. This Case Presents None of the "Special and Important Reasons" for Granting a Writ of Certiorari Specified in Rule 19 of the Revised Rules of This Court.

The outcome of this case is of interest solely to the litigants involved. There are no questions of public or federal law to be settled; there are no conflicts between the courts of appeals to be resolved; there is no conflict with any decision of this Court, nor has there been any departure from the accepted or usual course of judicial proceedings. To the contrary, as we shall show, the district court and court of appeals acted in accordance with well-established precedent. The circumstances which this Court has generally required for the issuance of a writ of certiorari are wholly absent in this case. See *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70 (1955); *S. S. Monrosa v. Carbon Black Export, Inc.*, 359 U. S. 180 (1959); *Rudolph v. United States*, 370 U. S. 269 (1962).

B. The Judgments of the Court of Appeals and District Court Are Not Erroneous.

1. Judge Pence Correctly Refused to Recuse Himself.

Petitioners do not assign as error the affirmance by the court of appeals of the order of Judge Pence denying petitioners' motion that he recuse himself. That order was not erroneous; it was in accordance with the applicable statute, 28 U. S. C., Section 144, the decisions of this Court, *Ex parte American Steel Barrel Co.*, 230 U. S. 35 (1913) and *Berger v. United*

States, 255 U. S. 22 (1921), and the decisions of all the courts of appeals that have ruled on the subject. See the cases cited in the opinion of the court of appeals at page 6 of the appendix to the petition.

2. The Conditional Order of Dismissal Was Not Erroneous and the Conditions Imposed Were Within the Discretion of the District Judge.

Petitioners' attempt to dismiss this action without prejudice came *after* respondent had incurred substantial expense in preparing her defense: *after* respondent had taken the deposition of petitioner Georgia McPheeters at substantial expense: *after* petitioners had themselves propounded written interrogatories and respondent had answered those interrogatories: and *after* respondent had filed a motion, in fact for summary judgment although denominated a motion to dismiss, which squarely raised the merits of the case and was based largely on matters outside the pleadings. The district judge's refusal to permit a voluntary dismissal without prejudice and without conditions at that late stage of the litigation was not erroneous, but was in accordance with the spirit of Rule 41(a) of the Federal Rules of Civil Procedure and supported by ample precedent. *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F. 2d 105, 107-108 (2d Cir.), cert. denied, 345 U. S. 964 (1953); *Littman v. Bache & Co.*, 252 F. 2d 479 (2d Cir. 1958); *Butler v. Denton*, 150 F. 2d 687 (10th Cir. 1945); *Tele-Views-News Co. v. S. R. B. TV Publishing Co.*, 28 F. R. D. 303, 306-308 (E. D. Pa. 1961); *Baker v. Sisk*, 1 F. R. D. 232 (E. D. Okla. 1938).

The district court has broad discretion in devising and imposing the terms and conditions of a dismissal

without prejudice under Rule 41(a)(2). See *American Cynamid Co. v. McGhee*, 317 F. 2d 295, 298 (5th Cir. 1963); *Blue Mountain Construction Co. v. Werner*, 270 F. 2d 305 (9th Cir. 1959), cert. denied, 361 U. S. 931 (1960); *Standard Natl. Insurance Co. v. Bayless*, 272 F. 2d 185 (5th Cir. 1959); *Diamond v. United States*, 267 F. 2d 23 (5th Cir.), cert. denied, 361 U. S. 834 (1959). This discretion includes the right to impose as a condition of dismissal the payment by the plaintiff of the defendant's attorneys' fees as well as costs. In the circumstances of this case, the amount set by the district judge was not an abuse of discretion. See *Federal Savings & Loan Insurance Corp. v. Reeves*, 148 F. 2d 731 (8th Cir. 1945), in which an award of attorneys' fees and expenses in the amount of $6,741.00 was held within the discretion of the trial court; *New York C. & St. L. R. R. v. Vardaman*, 181 F. 2d 769, 771 (8th Cir. 1950); *Derman v. Stor-Aid, Inc.*, 7 Fed. Rules Serv. 41a.22, case 6 (S.D. N.Y. 1943) in which a voluntary dismissal without prejudice was conditioned on the payment of $5,000.00 by plaintiffs to defendants. See 5 Moore, *Federal Practice*, Par. 41.06 (2d ed.).

The order of the district court directing that this action be dismissed without prejudice if petitioners complied with the conditions and terms set by the court, but that it be dismissed with prejudice if petitioners did not comply with those terms and conditions was correct. The courts of appeals have affirmed identical orders without any question of their propriety. *De Filippis v. Chrysler Sales Corp.*, 116 F. 2d 375 (2d Cir. 1940); *Stern v. Inter-Mountain Telephone Co.*, 226 F. 2d 409 (6th Cir. 1955). A similar order was also

made in *Gold v. Geo. T. Moore Sons, Inc.*, 3 F.R.D. 201 (S.D. N.Y. 1943), cited on page 10 of the petition.

None of the authorities cited by petitioners discloses any reason why a writ of certiorari should issue in this case. The law review note on which petitioners appear to place great reliance, *Exercise of Discretion in Permitting Dismissals without Prejudice under Federal Rule 41(a)*, 54 Colum. L. Rev. 616 (1954), actually more strongly supports the action of the district court than the arguments of petitioners. That note points out that the trial court's action in connection with voluntary dismissals "is discretionary [and] it will not be disturbed on appeal absent a clear showing of abuse", *id.* at 617, and that the terms and conditions imposed usually include allowance of reasonable expenses in addition to standard taxable costs, so that defendant will be compensated for the expense to which he has been put, *id.* at 618.

> "On the whole, the imposition of expenses is a salutary gloss on Rule 41(a)(2) in that it probably deters prospective plaintiffs from harassing defendants with unmeritorious lawsuits which they never intend to bring to trial, while, at the same time, justifiably compensating a defendant who has incurred expenses in the preparation of his case." *Id.* at 620. See also *id.* at 618, n. 17.

None of the cases cited on pages 10 and 11 of the petition in any way supports the argument that the district judge abused his discretion in requiring as terms and conditions of voluntary dismissal without prejudice that petitioners pay respondent's expenses and one-half of the reasonable attorneys' fees respondent in-

curred for only a portion of the services rendered by her attorneys [see R. p. 177, lines 1-20; p. 178, lines 3-11]. For this reason, those cases will not be discussed individually, except to point out that *DeFillipis v. Chrysler Sales Corp., supra*, 116 F. 2d 375, cited at page 10 of the petition squarely supports the judgments of the district court and court of appeals at bar. See also *Hawkins v. Lindsley*, 327 F. 2d 356 (2d Cir. 1964).

Except for *American Cyanamid Co. v. McGhee, supra*, 317 F. 2d 295, which supports the judgments below, the cases cited at pages 12 and 13 of the petition have nothing to do with dismissals under Rule 41(a) of the Federal Rules of Civil Procedure, and for that reason will not be discussed individually.

There is no merit whatever in petitioners' argument that the judgments of the district court and the court of appeals were erroneous because Mr. Houston in some way lacked authority. As has already been pointed out, although petitioner McPheeters was personally present before the court of appeals on two occasions and filed an affidavit of prejudice in the district court and an affidavit in the court of appeals, no claim was made that Mr. Houston in any way lacked authority until a petition for rehearing in the court of appeals was filed by petitioners' present counsel.

There is a rebuttable presumption that an attorney is authorized to act for his client, and that presumption applies to the compromise or dismissal of an action. See *Gagnon Co. v. Nevada Desert Inn, Inc.*, 45 Cal. 2d 448, 460-461, 289 P. 2d 466 (1955); *Pacific Tel. & Tel. Co. v. Fink*, 141 Cal. App. 2d 332, 338, 296 P. 2d 843 (1956); *United States v. Grain Importers, Ltd.*, 144 F. 2d 921, 925 (1st Cir. 1944); *Para-*

dise v. Vogtlandische Maschinen-Fabrik, 99 F. 2d 53 (3d Cir. 1938).

> "We will assume that members of the bar formally appearing for litigants before us and in other federal courts are authorized to so appear. (Hill v. Mendenhall, 88 U.S. 453, 21 Wall. 453, 454, 22 L. Ed. 616), and will continue to indulge in that assumption until the litigants or such attorneys formally and under oath challenge the truth of such assumption, or proof is submitted challenging the truth of such assumption, sufficient to warrant inquiry regarding such authority." *Department of Water & Power v. Anderson*, 95 F. 2d 577, 580 (9th Cir. 1938)

Conclusion.

Petitioners have shown no reason for invoking the extraordinary jurisdiction of this Court on certiorari. Indeed, petitioners' conduct throughout this litigation has been such as to wholly justify the orders of the district court permitting only a conditional dismissal without prejudice and dismissing this action with prejudice on failure of petitioners to meet the conditions specified. Petitioners have persistently and maliciously maligned and abused the district judge. At every change of attorneys by petitioners, they have cast unwarranted aspersions on the character and ability of their previous counsel. They have vexatiously multiplied expenses in this action. They filed a complaint against respondent and another in the Hawaii state court, based on the same claim asserted in this action, which was indecent and scandalous. They then dismissed the state court action voluntarily and later sought to revive it against respondent. In asking the district court to

set aside its orders, petitioners did not even attempt to make a showing that their claim in this action is meritorious. Petitioners' conduct throughout the proceedings in the district court and the court of appeals has shown a bent and determination by them to abuse and misuse the judicial process to vent their unfounded spleen on the late Governor Stainback and on the district judge.

For all of the reasons stated above, we respectfully submit that neither the district judge nor the court of appeals committed error. Petitioners have made no showing that the district judge in any way abused his discretion. We respectfully urge that the petition for a writ of certiorari be denied.

Respectfully submitted.

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